Supreme Court, U.S.
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NO. 95-841

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ALBERT AKINS, ET AL.,
PETITIONERS

v.

ZENECA, INC.,; RHONE-POULENC, INC.; RHONE-POULENC BASIC CHEMICALS COMPANY; STAUFFER CHEMICAL COMPANY; INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; LOCAL 912 INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEFS IN OPPOSITION

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PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEFS IN OPPOSITION

Petitioners submit the following reply to the briefs in opposition filed by Respondents.

1. **RHONE-POULENC, INC. AND RHONE POULENC BASIC CHEMICALS COMPANY.**

(a) Rhone-Poulenc incorrectly indicates in its question No. 1 (p. i of Rhone-Poulenc's brief) that the Court of Appeals ruled that the International Union did not breach its duty of fair representation to the Petitioners. In fact, the Court of Appeals held that the International Union had no duty of fair representation to Petitioners (contested by Petitioners) and specifically stated that "Local 912, not IUOE, is the exclusive bargaining representative of Plaintiffs and, therefore, Local 912 alone owes Plaintiffs a duty of fair representation". (App. 27, 28.)

(b) Rhone-Poulenc, in its opposition brief (p. 4), further states that the District Court concluded that under the § 301 hybrid claim against Rhone-Poulenc and the Union, Petitioners had failed to prove that there was both a breach of duty of fair representation by the Union and a breach of contract by the employer. This statement by Rhone-Poulenc is untrue. In fact, what the District Court held was that Rhone-Poulenc did not violate the contract because of the impossibility doctrine and accordingly, dismissed the § 301 hybrid claim against Rhone-Poulenc and the Union on that ground alone. The Court specifically stated that "there is no need for the Court to reach the question of whether there was a breach of fair representation". (App. 145, 146.)

After dismissing the § 301 hybrid claim, the District Court went on to discuss (App. 146-153) the "next claim", which

was an independent claim against Local Union 912 alone based on the deletion of the Cross Bumping Agreement from the ICI contract. This separate claim was not part of the § 301 hybrid claim against Rhone-Poulenc. (See n. 3 to Court of Appeals decision [App. 16] and n. 5 to the petition for certiorari [Pet. 18; see also, App. 145-153].)[1]

The Court of Appeals rejected the impossibility defense relied upon by the District Court but dismissed the § 301 hybrid cause of action against Rhone-Poulenc and the Unions solely on the claimed basis that Local 912 did not violate its duty of fair representation by failing to pursue a

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[1] In ruling on the summary judgment motions, the District Court clearly pointed out the distinction between the § 301 hybrid action against Rhone-Poulenc and the separate § 301 claim against Local 912. (See n. 19 at App. 90, 91; see also, App. 58-61, 82-94.) The District Court held evidence sufficient to prevent summary judgment had been presented to show that Rhone-Poulenc had breached its contract and Local 912 had breached its duty of fair representation by failing to process the grievance against Rhone-Poulenc. See also, App. 60, 293-295, 306, 307, 322-325.

grievance on behalf of Petitioners. (App. 13-16.) The Court of Appeals also drew a clear distinction between the § 301 hybrid action against Rhone-Poulenc and the separate fair representation claim against Local 912 alone. (n. 3 at App. 16; see also n. 5, p. 18 of petition for certiorari.)

(c) Rhone-Poulenc's dispute of Petitioners' reliance on Rhone-Poulenc's internal memorandum of 9/13/88 (p. 2 of Rhone-Poulenc's brief) is without merit. That memorandum was filed as Plaintiffs' exhibit No. 4 and was part of the record considered by the Court on the motions for summary judgment.

Furthermore, in the pre-trial order, the authenticity of that document was stipulated. (App. 211.) At the trial, the same document was offered as trial exhibit No. P-10 and excluded on the basis that a

witness with personal knowledge of the exhibit must testify to the exhibit.[2]

(d) Rhone-Poulenc erroneously indicates that Petitioners, rather than Respondents, have characterized the declaratory judgment action as a "friendly lawsuit" (p. 2 of Rhone-Poulenc's brief). As confirmed by the correspondence from the Union's attorney to each corporate respondent (App. 255-259), the Respondents had discussed, prior to suit, that the Union considered the declaratory judgment action a "friendly lawsuit". Moreover, ICI's letter of December 12, 1990 (App. 260-272), in relation to the

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[2]The document, on its face, contains relevant statements and identifies the author. Furthermore, the witness specifically identified the author and his relationship to Rhone-Poulenc and further testified to the negotiation proceedings contemplated by the proffered exhibit. (TR. 562, 577, 578, 628-634, 563-567.) To require a witness with specific personal knowledge of the document to testify as a condition of admissibility after authenticity has been stipulated, makes the stipulation meaningless. Rules 402 and 901 of the Federal Rules of Evidence; ;McCormick on Evidence (3rd ed. 1984) § 227, p. 698); 7 Wigmore, Evidence §§ 2128(3), 2130-2132. (After authentication, "counsel" may read or submit document to jury.)

declaratory judgment action, lends even greater support to the conspiracy claim.

2. ICI (ZENECA, INC.)

ICI argues that it should be able to retain the benefits it secured from inducing the Union to breach its trust and contractual obligations to Petitioners. To support its position, ICI is reduced to arguing that its letter of December 12, 1990 (App. 260-272), was a letter from ICI's attorney rather than from ICI. The letter clearly reflects that it is the considered actions of ICI. ICI's argument is factually incorrect[3] and contrary to the holdings in Steele v. L & N Railroad Company, 323 U.S. 192, 202, 203, 207, 65 S.Ct. 226, 232-234, 89 L.Ed. 173 (1944); Brotherhood of Locomotive

[3]ICI also argues (brief, p. 5) that it was misleading for Petitioners to state that "[n]o member from the bargaining unit at the furnace plant was permitted to participate in the negotiations relating to the organic plant". However, those quoted words are from paragraph No. 17 of the complaint (R. 1), which was admitted by Local 912 in its answer. (R. 23.)

Firemen, etc. v. Mitchell, 190 F.2d 308, 312, 313 (5th Cir. 1951).

3. **INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO.**

Contrary to the argument[4] of the International Union, Petitioners specifically stated, in the pre-trial order, they were claiming that "the International Union breached its contractual obligations to Plaintiffs under Section VI(2)(3) and (5) and XXIV(11)(e) of the IUOE Constitution". (App. 179, 180, 547, 208-211.) In addition to the proof on all of the designated constitutional sections, Petitioners' attorney, during the trial, specifically argued to the Court the express wording of Article VI(5). (App. 416, 417.)

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[4]The International Union erroneously continues to rely upon agency defenses and decisions that pre-date Wooddell v. International Bd. of Elec. Workers, 502 U.S. ____, 112 S.Ct. 494, 116 L.Ed.2d 419 (1991). (See also, Pet. 22-25.) The Union's waiver defenses are also without merit. (See Pet., p. 23, n. 8 and p. 18, n. 5.)

4. LOCAL 912, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO.

The Local Union's claim that the ICI negotiating committee had authority to accept the 1991 ICI contract on behalf of Petitioners, is not only factually incorrect, but is also contrary to the admissions made by Local Union 912 in its answer.[5] The record contains voluminous factual testimony (ignored by Respondents)[6] that Petitioners never

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[5] Paragraph No. 17 of the complaint (R. 1), as admitted by Local Union 912 (R. 23) , stated as follows:

> 17. No member of the bargaining unit at the phosphate plant was permitted to participate in the negotiations relating to the organic plant. No member of the bargaining unit from the phosphate plant ever agreed to or authorized the deletion of the September 13, 1982, agreement. The June, 1991 agreement between ICI Americas Inc. and Local Union No. 912 was never authorized or approved by, nor submitted to, the bargaining unit for the phosphate plant.

[6] Mr. Carroll testified (App. 296, 297) as follows:

> Q And what did Mr. Kincade continue to tell you?
>
> A He kept telling us that they could not affect us. If they voted it out of their contract, they could not vote ours away.

...

Q Mr. Carroll, if you had known ultimately, looking back, if you had known that the ICI employees deleting that from the contract, deleting the cross bumping portion from your contract would have affected your rights what would you have done?

A The first thing that we would have done was wanted a committee, our committee in on those meetings, and to represent our behalf. And if they had ever tried to vote it out, they couldn't because we had 250 members. They had a hundred twenty-five. It just wouldn't have come out of there.

Q The ICI contract of 1991, was that ever submitted to you or the employees at Rhone-Poulenc for approval?

A No, ma'am.

Mr. Paley also testified at the trial as follows:

Q. Did any member of the bargaining unit for the furnace plant ever approve or authorize any changes in the cross bumping agreement when it was dropped from the organic plant contract?

A. No, sir. We had no say in that whatsoever.

Q. All right. Did any member from the furnace plant have any say in the selecting of the negotiating committee?

authorized the Union or anyone else to surrender their rights and that in fact, the Union continually falsely represented to Petitioners that their rights would not be affected.

Respectfully submitted,

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A. No, sir. Nor the proposals of the negotiating committee.

Q. You just had nothing to do with it at all, is that right?

A. Nothing whatsoever.

Q. No member of your bargaining unit at the furnace plant?

A. No, sir. (Tr. 571, 572.)